IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:07.09.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

WRIT PETITION NO.9859 OF 2000

S. Dayalan .. Petitioner

Vs.

1.Deputy Commissioner of Labour
(Appeal) Labour Welfare Building
Anna Salai, Chennai 6.

2.Deputy Registrar of Co.operative
Society, Kanchipuram.

3.The Sriperumbudur Taluk
Co.operative Society rep. By
its Managing Director
Nazaratpet, Poonamallee. .. Respondents

Writ Petitions filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus as stated therein.

For petitioners : Mr.P. Jayaraman Senior Counsel for
T. Kishorekumar
For respondents : Mr. M.R. Jothimanian
Government Advocate for R.1 & R.2

Mr. Balan Haridas for R.3

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ORDER

This writ petition is directed against the order of the Deputy Commissioner of Labour (Appeals), Labour Welfare Building, Chennai-6, the first respondent herein, dated 11.6.1999 passed in T.S.E.Case No.26/97 confirming the order of the third respondent dated 17.2.1992 dismissing the petitioner from service and also to direct the third respondent to restore the petitioner to the post of Branch Manager to pay all the attendant and other benefits.

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2. The petitioner was initially appointed as a Clerk in the year 1967 by the President of the Sriperumbudur Taluk Co-operative Marketing Society and has been working there for the past 28 years. He was then appointed as a Branch Manager by the Special Officer of Sriperumbudur Taluk Co-operative Marketing Society and was paid the last drawn wages of Rs.1900/-. The second respondent, Deputy Registrar of Co-operative Societies issued a notice dated 4.12.1989 to the petitioner asking explanation regarding recovery of a sum of Rs.23,971.53 and the petitioner has also submitted his explanation on 13.12.1990 and the said notice was issued after the lapse of six years from the date of alleged conduct of the petitioner. Even though the petitioner has requested for certain documents, ultimately, the second respondent, by order dated 3.12.1990 has directed the petitioner to pay the amount. It was, aggrieved against the said order of the second respondent, the petitioner filed an appeal before the Special Tribunal for Co-operative Societies Cases and the order of the second respondent was stayed and finally, the appeal was allowed and the matter was remanded back to the 2nd respondent for fresh disposal.

3. In the meantime, the Special Officer has initiated disciplinary proceedings separately against the petitioner on the same cause of action which was the subject matter of the proceedings of the second respondent dated 3.12.1990, directing the petitioner to pay a sum of Rs.23,971.53. The Special Officer has also issued two charge sheets on 25.6.1990 and 7.8.1991 and initiated domestic enquiry against the petitioner. The petitioner has also submitted his explanation, based on which the third respondent has decided to hold a domestic enquiry. Thiru A.Muthukrishnan was appointed as the Enquiry Officer and the enquiry was commenced on 13.9.1991. However, the petitioner was not given any notice. The petitioner understands that on 25.9.1991, in the enquiry, the Presenting Officer was examined as M.W.1, apart from other staffs examined as M.W.2 to M.W.6. The petitioner was not informed of the enquiry proceedings held on 25.9.1991, but the enquiry officer directed the respondents to furnish copies of Exhibits M9, 11, 12, 13 and 33 to 38, which were furnished on 25.1.1992 and thereafter the enquiry was adjourned without any specific date.

4. It is the case of the petitioner that the matter was adjourned to 13.2.1992 and subsequently to 16.2.1992, in respect of which the petitioner was not informed. The Enquiry Officer appears to have submitted his report and there was no second opportunity given to the petitioner enclosing the report of the Enquiry Officer. On 17.2.1992 itself a dismissal order seems to have been passed by the third respondent. Sensing that he may not be given an opportunity, the petitioner moved the Civil Court by filing O.S.No.309 of 1992 on the file of the District Munsif's Court, Poonamallee, seeking for permanent injunction against the domestic

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enquiry and in I.A.No.389 of 1992, an order of interim injunction was granted by the learned District Munsif, Poonamallee on 18.2.1992 against the third respondent. According to the petitioner, it was after receiving notice in respect of the order of the Court, the third respondent passed the order of dismissal dated 17.2.1992 without a show-cause notice. After knowing the order, the third respondent filed a counter in I.A.No.389 of 1992 and also filed an application to vacate the order of injunction, wherein there was a reference about the order of dismissal dated 17.2.1992. The injunction application was dismissed on 4.12.1992. The petitioner filed C.M.A.No.12 of 1993 on the file of Sub Court, Poonamallee against the order in I.A. and the Sub Judge, Poonamallee dismissed the C.M.A. on 15.6.1994. Against the said order, the petitioner filed C.R.P.No.2860 of 1994. The injunction petition filed along with the C.R.P. was dismissed on 23.2.1992 on the ground that the petitioner was already dismissed from service. Later the C.R.P. was also disposed of on 18.4.1996.

5. According to the petitioner, in spite of it, the dismissal order dated 17.2.1992 was not served on him. He filed W.P.No.11441 of 1996 for the supply of dismissal order based on the representation and ultimately, the copy of the dismissal order was forwarded to him on 8.10.1996. Thereafter, he preferred an appeal before the first respondent together with condone-delay petition on 17.12.1996. The first respondent has condoned the delay and numbered the appeal as T.S.E.26/97. In the appeal, the third respondent did not appear and he was set ex parte and it was set aside on payment of cost. The third respondent participated in the enquiry and let in evidence and final order was passed on 10.6.1999. According to the petitioner, the order of the first respondent was also not communicated to him and it was only after making complaint to the Chief Commissioner of Labour, the order copy was dispatched to the petitioner's counsel on 8.2.2000 and the copy was received on 11.2.2000.

6. Appeal under the Tamil Nadu Shops and Establishments Act, 1947 has to be disposed of within six months but in the case of the petitioner, it was kept pending between 16.11.1997 to 10.6.1999. It is the case of the petitioner that it was the third respondent who has been inimically disposed towards the petitioner. It was the Special Officer Mr.Ganesan who had originally initiated surcharge proceedings against the petitioner acted in arbitrary manner in order to prevent certain benefits to be conferred on the petitioner. The order of the first respondent is challenged by the petitioner on various grounds including that the domestic enquiry was not conducted properly and no notice of enquiry was given to the petitioner and the petitioner has also imputed bias on the basis that surcharge proceedings initiated against the petitioner was set aside on appeal in S.T.C.No.126 of 1991 and remanded back to the

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second respondent and it is only to settle the score, the present disciplinary proceedings has been initiated. It is also the case of the petitioner that copy of the dismissal order was not served for a long time.

7. The third respondent has filed a counter affidavit. It is the case of the third respondent that disciplinary proceedings was initiated against the petitioner and after due enquiry, for the proved grave misconduct, the petitioner was dismissed from service on 17.2.1992 against which the petitioner filed an appeal under section 41 of the Tamil Nadu Shops and Establishments Act, 1947 before the first respondent. The first respondent on adjudication, held that the domestic enquiry was conducted properly and ultimately dismissed the appeal. It is the case of the third respondent that against the petitioner two charge memos were issued on 25.7.1990 and 7.8.1991. The petitioner filed his explanation on 1.8.1990 and 14.8.1991. Since the explanation was not satisfactory, the domestic enquiry was ordered. The enquiry was fixed on 13.9.1991 for which notice was sent to the petitioner on 4.9.1991 by registered post, however, the enquiry notice was returned since the petitioner failed to receive the same. The enquiry was rescheduled on 25.9.1991 at 10.30 a.m. for which the third respondent issued enquiry notice dated 19.9.1991. It was sent through Mr.Ponnusamy, Office Peon and through Mrs.M.Radha Bai. But, both could not serve the enquiry notice as the petitioner refused to receive the same and they have also submitted report dated 20.9.1991, 23.9.1991 and 24.9.1991. In fact, subsequently, the management issued telegram dated 22.9.1991 informing the petitioner that the enquiry would be conducted on 25.9.1991.

8. On 25.9.1991 at 10.30 a.m., the enquiry commenced. The petitioner was absent. Even though the petitioner was aware of the enquiry, he has deliberately absented himself. In such circumstances, the evidence of witnesses on the side of management was recorded. In order to give further opportunity to the petitioner, the enquiry was adjourned to 13.1.1992 and enquiry notice was published in Daily Thanthi newspaper on 9.1.1992 and the enquiry notice was also sent by registered post with acknowledgement due. The petitioner received the notice and signed the acknowledgement card also. Since the Enquiry Officer had some other work, it was postponed without any date which was duly informed by the third respondent on 13.1.1992. In the meantime, the petitioner gave a letter on 20.1.1992 stating that he joined duty. By a subsequent enquiry notice dated 21.1.1992, the petitioner was informed that the enquiry would be held on 22.1.1992 at 3.00 p.m. On 25.1.1992, the petitioner came to the enquiry and informed that he was not ready and sought for time. Copies of enquiry proceedings were given to him and it was adjourned to 13.2.1992 at 9.30 a.m., at request of the petitioner, by giving 18 days time to the petitioner

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to prepare for the enquiry. Again on 25.1.1992, the petitioner was furnished with all the documents. However, the petitioner did not appear for enquiry on 13.2.1992. On the other hand, he sent a telegram stating that he continued to be sick and wanted 10 more days time. However, on 7.2.1992, the petitioner came to the Head Office and received his salary by signing the salary register. By a letter dated 20.1.1992 itself, the petitioner has stated that he recovered from illness and fit for resuming duty and therefore, the petitioner wantonly did not appear for the enquiry on 13.2.1992.

9. The Enquiry Officer concluded the enquiry as the petitioner failed to avail the opportunities extended to him many times and the Enquiry Officer submitted his report on 16.2.1992 holding that the charges levelled against the petitioner were proved. The findings of the Enquiry Officer were forwarded to the petitioner by the third respondent Society along with the second show-cause notice dated 16.2.1992 giving another opportunity to the petitioner to give explanation, but the petitioner refused to receive the same and there was no reply from the petitioner also in respect of the 2nd show-cause notice. Therefore, the 3rd respondent passed the order of punishment of dismissal on 17.2.1992 and the same was communicated to the petitioner by registered post. It is the case of the third respondent that it is only after coming to know about the order of dismissal, the petitioner moved the Civil Court on 18.2.1992 and obtained an order of interim injunction and ultimately, the injunction petition was dismissed on 2.12.1992. The Appeal in C.M.A.No.12 of 1993 before the Sub Court, Poonamallee preferred by the petitioner was also dismissed. The C.R.P.No.2860- of 1994 filed by him was dismissed by this Court on 18.4.1996 and ultimately the suit was dismissed on 10.9.1997. It was five years after the order of dismissal, the petitioner has chosen to file the appeal under the Tamil Nadu Shops and Establishments Act. The first respondent, after elaborate discussion, has held that the findings of the third respondent are proper and confirmed the same. The petitioner in this case is seeking to reappreciate the evidence, which cannot be done.

10. It is the case of the third respondent that the charge itself is very serious, viz., causing loss to the extent of Rs.23,971.53. It is also the case of the third respondent that surcharge proceedings has nothing to do with the present charge sheet dated 25.6.1990 and while the surcharge proceedings is to recover the amount, the disciplinary proceedings is in respect of misconduct. The conduct of the petitioner shows that the petitioner has been evading to receive notice relating to domestic enquiry. It is also stated that the opinion of Mr.Ganesan, Special Officer dated 14.7.1994 has never been considered by the first respondent or the third respondent in rendering a decision against the petitioner. In spite of several opportunities given to the

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petitioner, the petitioner failed to appear in the enquiry and the Enquiry Officer was not at fault and according to the third respondent, the litigation is only speculative in nature and therefore liable to be dismissed.

11.Mr.P.Jeyaraman, learned senior counsel appearing for the petitioner would submit that on the very first hearing after the charges were framed, the third respondent proceeded with ex parte enquiry. According to the learned senior counsel, the presenting officer Mr.Kalaiarasan was inimically disposed towards the petitioner. He would point out that some of the dates fixed for the enquiry happened to be Sundays. He would submit that the dismissal order itself has not been served and it was only after filing W.P.No.11441 of 1996, copy of the dismissal order was furnished and thereafter the appeal was filed under Section 41 of the Tamil Nadu Shops and Establishments Act. He would also submit that in the report of the Special Officer addressed to the Deputy Registrar of Co-operative Societies dated 9.7.1993 it is clearly stated that the procedure followed in initiating disciplinary proceedings, is not proper and it would amount to two punishments for a single act and the same has not been taken into consideration by the third respondent while proceeding in the domestic enquiry. It is also his contention that the said report of the Special Officer addressed to the Deputy Registrar of Co-operative Societies dated 9.7.1993 had never formed part of the enquiry proceedings at all and the third respondent did not consider the same. It is his contention that the first respondent being the appellate authority has not even taken into consideration the evidence given by the petitioner before the appellate authority and also the cross-examination of the witness, Kalaiarasan. Learned senior counsel would also rely upon the judgement of the Supreme Court in State of U.P. v. Shatrughan Lal (1998(6) SCC 651) to show that the non-supply of documents would vitiate the enquiry. He would rely upon the judgement of Karnataka High Court in K.V.P.Rao v. Karnataka Dairy Devpt. Corpn. (1997 (3) LLN 252) to urge his point that the essential factors relating to domestic enquiry have not been followed. He would further rely upon the judgement of the Supreme Court in State of Punjab v. Amar Singh Harika (1996(2) LLJ 188) to drive home the prejudice test and to substantiate his contention about the perversity, he would also rely upon the judgement of the Supreme Court in South Bengal State Transport Corpn. V. Sapankumar Mitra (2006(2) SCC 584).

12. On the other hand, Mr.Balan Haridas, learned counsel appearing for the 3rd respondent would submit that it is not correct to state that the petitioner was not aware of the order of dismissal passed against him on 17.2.1992. In this regard, he would also refer to the proceedings in the civil Court wherein the order of dismissal was filed by consent on 5.3.1992 itself. He would

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submit that the entire conduct of the petitioner would show that he has been in evading tactics even in receiving the notice as well as copy of order of dismissal. He would also submit that the concept of prejudice theory has never been raised by the petitioner at any point of time in respect of Enquiry Officer's report before the appellate authority. He would rely upon the judgement in State of U.P. v. Harendra Arora (2001(3) LLN 42), to show that merely non-supply of Enquiry Officer's report will not vitiate the enquiry proceedings unless the prejudice which has been caused by non-supply is proved by the employee. It is also his submission that in this case, the petitioner has been given copies of various documents and the matter was adjourned for many dates. He would submit that the proceedings under section 87 of the Co-operative Societies Act for surcharge is different from the disciplinary proceedings; while surcharge proceedings relates to monetary loss caused to the Society, the disciplinary proceedings relates to misconduct. He would submit that even acquittal in criminal cases is not a bar to surcharge proceedings. He would submit that in cases of this nature, it is the preponderance of probabilities that is the requirement for deciding the issue. He would rely upon the judgement of the Supreme Court in B.C.Chaturvedi v. Union of India (1997(4) LLN 65). He would also submit that in the present case, the third respondent and the first respondent have found that the domestic enquiry has been conducted validly and the charges have been proved and therefore this Court cannot be called upon to reappreciate the evidence.

13. I have heard learned senior counsel for the petitioner as also learned counsel for the third respondent, and perused the entire records.

14. It is seen that a charge was framed against the petitioner on 25.6.1990 while he was working as an Accountant in the third respondent Society and the charge framed was that he has caused loss to the extent of Rs.24,271.53 by shortage of stock and in spite of the direction to reimburse the same, he has not done so. Subsequently, on 7.8.1991 further charges were framed against him which include the following:

"

(i) the petitioner has failed to perform his functions;

(ii) he has committed disobedience in not following directions of the Managing Director;

(iii) by his negligence, the petitioner has caused a bad name to the Society; and

(iv) by giving false information, he has acted against the interest of the Society and also he got bribe."

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Along with the said charges, various imputations have been made. The petitioner has submitted his explanation to the first charge memo on 1.8.1990 and for the second charge memo on 14.8.1991. It is the case of the petitioner that the first charge memo dated 25.6.1992 relates to the loss caused to the Society in respect of which surcharge proceedings were initiated as per the provisions of the Tamil Nadu Co-operative Societies Act by the first respondent and ultimately, the second respondent has passed orders on 3.12.1990 calling upon the petitioner to reimburse the amount of Rs.23,970.53. It is seen that as against the order passed in surcharge proceedings by the second respondent, the petitioner has filed an appeal before the Principal District Judge, Chengleput in Co-operative C.M.A.No.7 of 1995 and by order dated 30.8.1995, the learned District Judge, while cancelling the said surcharge order, directed the second respondent to pass fresh orders after giving opportunity to the petitioner. It is after remand, the second respondent has passed fresh order on 29.8.1997 directing the petitioner to pay the amounts, Rs.1,359.50, Rs.12,112.65 and Rs.8,947.56. That order was again challenged by the petitioner in C.M.A.No.7 of 1998 on various grounds including the question of limitation. Ultimately, by order dated 27.4.2005, the learned District Judge, Chengleput set aside the second surcharge order dated 29.8.1997 passed by the second respondent. It is relevant to point out that the District Court has found at least in one place that the petitioner has admitted his liability by a letter in respect of the amount. It is during this time, the above first and second charge memos were issued against the petitioner on 25.6.1990 and 7.8.1991.

15. The first contention raised by the learned senior counsel for the petitioner that once surcharge proceeding initiated against the petitioner under the Tamil Nadu Co-operative Societies Act ended in favour of the petitioner, the first charge memo dated 25.6.1990 issued against the petitioner to the effect that he has caused loss to the Society goes and therefore, the petitioner ought to have been exonerated from the said charge. However, he has no answer to the second charge memo dated 7.8.1991 which are relating to the functioning of the petitioner as a Branch Manager and not relating to the surcharge proceedings. It is relevant to point out that when a question arose under the provisions of the Tamil Nadu Co-operative Societies Act and surcharge proceedings were simultaneously initiated under the said Act, a Division Bench of this Court has held that the mere initiation of surcharge proceedings under section 71 of the said Act (old Act) does not prevent arbitration proceedings to be commenced under section 73 of the Act on the basis that the proceedings under the said provisions are different and distinct (vide: Venkatachalam(deceased) v. The Special Tribunal for Co-operative Cases, Madras (1996 (2) MLJ 69). The relevant portion of the judgement of the Division Bench is as follows:

" 3. We may also point out that arbitration proceedings

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would have been still maintainable even if surcharge proceedings under Sec.71 of the Act were initiated, because this is a case wherein according to the society there was a deficit of stock which was in-charge of the petitioner, but which fact was disputed by the petitioner. In such a situation it is open to the society either to adopt the course provided under Sec.71 or under Sec.73 of the Act. At the same time it is not possible to hold that the petitioner would not be liable to be proceeded with under Sec.71 of the Act, as the basis for the proceeding under Sec.71 of the Act is quite different as pointed out above. Action under the one does not exclude the actin under another inasmuch as one is not substitution of another and are independent of each other. ....."

16. In another case, the Division Bench has held that mere acquittal of an Ex-Director of a Co-operative Society in a criminal case is not a bar for initiating civil proceedings under section 71 of the Tamil Nadu Co-operative Societies Act, 1961. That was in P.Jagannatha Pillai and another v. The Deputy Registrar of Co-operative Societies (1999 (2) L.W. 333). The following paragraphs of the Division Bench judgement are relevant:

" The Deputy Registrar was quite aware of the necessity to prove wilful negligence. In this connection, while the ex-employees of the Bank were found guilty of misappropriation and breach of trust in relation to the funds of the Bank, the ex-Directors were acquitted in the criminal proceedings. The acquittal by the Criminal Court would not enable the ex-Directors to contend that the wilful negligence cannot be proved in a surcharge proceeding under Section 71 of the Act. The prosecution in the criminal court is different from proving wilful negligence on the part of the ex-Directors. .... "

17. As I have stated earlier, in the present case, it is true that surcharge proceedings under the Tamil Nadu Co-operative Societies Act were initiated and ultimately, the District Court has set aside the said proceedings. The charges framed under the second charge memo dated 7.8.1991 are not only unconnected to the surcharge proceedings, but also different and distinct in nature. On the factual situation, I do not see any reason in the contention of the learned senior counsel for the petitioner that the disciplinary proceedings is vitiated on this ground.

18. In respect of the next contention raised by the learned senior counsel for the petitioner that the petitioner was not given sufficient opportunity, it is clear on facts that the petitioner has submitted his explanation and it is not as if on the first hearing

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date, viz., 25.9.1991 the enquiry was proceeded ex parte. It is seen that for the enquiry date 13.1.1992, a notice through registered post with acknowledgement due was sent to the petitioner and the same was received by him. Apart from that there was a notice issued in the newspaper dated 09.01.1992 and the enquiry was then rescheduled to 25.1.1992 due to non-availability of the Enquiry Officer, for which another notice was given on 21.1.1992. The petitioner has appeared for the enquiry, but refused to participate. It appears that on 25.9.1991, the witnesses on the side of employer were examined. In order to give one more opportunity to the petitioner, the Enquiry Officer adjourned the enquiry to 13.2.1992 as requested by the petitioner and on 25.01.1992, the petitioner was furnished with all documents. On 13.2.1992, the petitioner did not appear, but only sent a telegram of his illness. Therefore, for the enquiry on 25.1.1992 and 13.2.1992, the petitioner has received notices as it is also seen from the dismissal order passed by the third respondent and in spite of the same, the petitioner did not appear on 13.2.1992 and that resulted in completion of the ex parte enquiry. Therefore, on the factual situation, it cannot be said that the petitioner was not aware of the enquiry and he was not informed of the same.

19. The contention raised by the learned senior counsel for the petitioner that the enquiry notice was given by the Special Officer and not by the Enquiry Officer is not sustainable and the same cannot vitiate the enquiry as such. The fact that pursuant to the enquiry notice dated 21.1.1992, the petitioner appeared on 25.1.1992 and asked for some more time and on the side of the employer, copies of enquiry proceedings were given to him and the enquiry was adjourned to 13.2.1992 at 9.30 a.m. as it is specifically stated in the counter affidavit of the 3rd respondent, which is not denied. Therefore, on 25.1.1992, the petitioner has been given copies of all documents and at his request, the matter was adjourned to 13.02.1992 since he required 18 days time, but on that date, the petitioner failed to appear, but sent a telegram stating that he is sick. It is curious to note that on 7.2.1992, the petitioner has come to the Office and received the salary by signing the salary register which has not been denied. Further, by his letter dated 20.1.1992 he has stated that he has been recovered from illness and fit for duty and therefore, it is clear that the intention of the petitioner is only to get the enquiry proceedings postponed under one pretext or the other as it is correctly found by the third respondent and confirmed by the first respondent. Therefore, it is too late for the petitioner to make a hue and cry that he has not been informed and no sufficient opportunity was given to him. In view of the above said position, I do not think it is necessary to refer to the judgements relied upon by the learned senior counsel for the petitioner about the non-supply of documents.

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20. The next submission made by the learned senior counsel for the petitioner that the Enquiry Officer's report has not been served on the petitioner cannot be taken to be a correct one. It is specifically stated in the counter affidavit filed by the third respondent that the Enquiry Officer's report dated 16.2.1992 was sought to be served on the petitioner along with the enquiry notice which was refused to be received by the petitioner and the same was affixed in his house and this statement has not been controverted, and in those circumstances, the dismissal order came to be passed on 17.2.1992. The fact that the petitioner is not repudiating the claim of the third respondent that he refused to receive the second show-cause notice on 16.2.1992 itself is sufficient to show that there was any restriction on the part of the third respondent in passing the final order on the next date, viz., 17.2.1992. The subsequent conduct of the petitioner in this regard itself abundantly proves the statement of the third respondent that the petitioner refused to receive the notice on 16.2.1992.

21. Admittedly, the petitioner has approached the Civil Court on 18.2.1992 and got an order of injunction not to terminate him from service. In the factual situation, it can be presumed that the petitioner knowing about the order of dismissal which was passed on 17.2.1992, has approached the Civil Court on 18.2.1992. It is the specific case of the third respondent that the petitioner was communicated with the order of dismissal dated 17.2.1992, however, the same is denied by the learned counsel for the petitioner. A reference to Ex.B-11 marked in the Civil Court in I.A.No.389 of 1992 in O.S.No.309 of 1992 on the file of District Munsif, Poonamallee shows that the said Ex.B-11 is nothing but the order of dismissal passed against the petitioner dated 17.2.1992 and the same has been marked, proved and admitted in the Civil Court by consent of both the parties on 05.03.1992. If that is so, what prevented the petitioner from approaching the appellate authority within the time prescribed under the Tamil Nadu Shops and Establishments Act is not known.

22. It is admitted that the appeal filed against the order of dismissal dated 17.2.1992 was only in the year 1997. There is one another factor which is relevant as seen in the counter affidavit of the third respondent that by a letter dated 20.01.1992, the petitioner joined duty and he was working. In such circumstances, the conduct of the petitioner clearly shows that he was not in any way co-operative to the domestic enquiry conducted by the third respondent. In such circumstances, the theory of prejudice which is alleged by the learned senior counsel for the petitioner has no relevance. As correctly pointed out by the learned counsel for the third respondent, even before the appellate authority, viz., the first respondent, it was not the case of the petitioner that any

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prejudice has been caused to him by the non-supply of the Enquiry Officer's report. There is no plea raised by the petitioner before the appellate authority in this regard also probably due to the reason that he has received such report. Such a person who has admittedly delayed the proceedings with a calculated design cannot attribute any motive or mala fide on the Enquiry Officer. On the factual situation in this case, I do not see any reason to come to the conclusion that any such motive was in fact in existence either on the part of the third respondent or the Enquiry Officer. In this regard, it is relevant to point out the observation of the Supreme Court in Dalmia Dadri Cement Ltd.v. Shri Murari Lal Bikaneria (1970 (1) LLJ 416), wherein the Apex Court observed as follows:

> " 20. ..... We have referred in some detail to the correspondence which passed prior to the enquiry merely to show that Murari Lal's attitude throughout was to delay the proceedings and to frustrate them if possible. His excuse for not appearing in the proceedings was frivolous objections from time to time to hold up the enquiry. Moreover the delay in the holding of the enquiry, if any, was not made a ground of complaint by Murari Lal and the Tribunal's comment in regard thereto appears to be unjustified."

23. Apart from the fact that in the present case, the third respondent has taken effective steps to supply a copy of the Enquiry Officer's report with the second show-cause notice and in any event, no prejudice is said to have been caused to the petitioner and the fact the same having not been raised even before the appellate authority itself cannot be a ground to set aside the order of dismissal. A Division Bench of this Court, by referring to various judgement of the Supreme Court on this issue in G.M.R.M.T.Corpn. Ltd. v. Victor (2004 (1) LLN 825) has held as follows:

> " 2. In this case, the enquiry officer's report has been sent by the disciplinary authority along with the notice which called upon the respondent to offer his explanation on the proposed punishment. When the prejudice caused to the respondent has not been made out, the non-issuance of the second show cause notice by furnishing the enquiry officer's report would not by itself be a ground for setting aside the order of dismissal. The same principle has been followed by the Supreme Court in its following subsequent decisions State Bank of Patiala vs. S.K. Sharma (1996 (1) LLJ 819); Rajednra Singh v. State of Madhya Pradesh (AIR 1996 SC 2736); M.C. Mehta v. Union of India (1999 (2) LLJ 94) and Aligar Muslim University v. Mansoor Ali Khan (2002 (3) LLN 380) ..... "

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24. In respect of violation of principles of natural justice, it is well-settled that the violation of a procedural rule or requirement governing the enquiry should be examined on the touchstone of prejudice and that was the law laid down by the Supreme Court in State Bank of Patiala v. S.K.Sharma (1996 (1) LLN 819). The relevant portion reads thus:

> "29. The decisions cited above make one thing clear, viz., principles of natural justice cannot be reduced to any hard and fast formulae. As said in Russell v. Duke of Norfolk (1949 (1) ALL E.R. 100) way back in 1949, these principles cannot be put in a straight-jacket. Their applicability depends upon the context and the facts and circumstances of each case. (See Monhinder Singh Gill v. Chief Election Commissioner (1978 (2) SCR 272). The objective is to ensure a fair hearing, a fair deal, to the person whose rights are going to be affected. (See A.K. Roy v. Union of India (AIR 1982 SC 710) and Swadeshi Cotton Mills v. Union of India (AIR 1981 SC 818). As pointed out by this Court in A.k. Kraipak and others v. Union of India and others (1969 (2) SCC 262), the dividing line between quasi-judicial function and administrative function (affecting the rights of a party) has become quite thin and almost indistinguishable - a fact also emphasised by House of Lords in C.C.C.U. v. Civil Service Union (vide supra), where the principles of natural justice and a fair hearing were treated as synonymous. Whichever the case, it is from the stand point of fair hearing - applying the test of prejudice, as it may be called - that any and every complaint of violation of the rule of audi alteram partem should be examined. Indeed, there may be situations where observance defeat the very proceeding - which may result in grave prejudice to public interest. It is for this reason that the rule of post-decisional hearing as a sufficient compliance with natural justice was evolved in some of the cases, e.g., Liberty Oil Mills v. Union of India (1984 (3) SCC 465). There may also be cases where the public interest or the interest or the interests of the security of State or other similar considerations may make it inadvisable to observe the rule of audi alteram partem altogether (as in the case of situations contemplated by Cls.(b) and (c) of the proviso to Art.311(2) or to disclose the material on which a particular action is being taken. There may indeed be any number of varying situations which it is not possible for anyone to foresee. In our respectful opinion, the principles emerging from the decided cases can be stated in the following terms in relation to the disciplinary

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orders and enquiries: a distinction ought to be made between violation of the principle of natural justice, audi alteram partem, as such and violation of a facet of the said principle. In other words, distinction is between "no notice" no hearing and "no adequate hearing" or to put it in different words "no opportunity" and "no adequate opportunity". To illustrate – take a case where the person is dismissed from service without hearing him altogether (as in Ridge v. Baldwin (1964 A.C. 40) (vide supra). It would be a case falling under the first category and the order of dismissal would be invalid or void, if one chooses to use that expression (Calvin v. Carr (1980 A.C. 574) (vide supra). But where the person is dismissed from service, say without supplying him a copy of the enquiry officer's report (Managing Director, Electronic Corporation of India Ltd., vs. B. Karunakar (1994 (2) LLN 9) (vide supra) or without affording him a due opportunity of cross examining a witness (K.L. Tripathi (1984 (1) LLN 19) (vide supra), it would be a case falling in the latter category – violation of a facet of the said rule of natural justice in which case, the validity of the order has to be tested on the touchstone of prejudice, i.e., whether, all in all, the person concerned did or did not have a fair hearing. It would not be correct in the light of the above decisions to say that for any and every violation of a facet of natural justice or of a rule incorporating such facet, the order passed is altogether void and ought to be set aside without further enquiry. In our opinion, the approach and adopted in B. Karunakar (vide supra), should govern all cases where the complaint is not that there was no hearing (no notice, no opportunity and no hearing) but one of not affording a proper hearing (i.e., adequate or a full hearing) or of violation of a procedural rule or requirement governing the enquiry the complaint should be examined on the touchstone of prejudice as aforesaid."

25. The said principle that even though the requirement of copy of enquiry report under a statutory rule was procedural and mandatory in nature, nevertheless the delinquent has to show that he has been prejudiced by non-observance of the said rule was again reiterated by the Supreme Court in State of U.P. v. Harendra Arora (2001 (3) LLN 42). The affirmation of law by the Supreme Court in this regard is as follows:

" 22.Thus, from a conspectus of the aforesaid decisions and different provisions of law noticed, we hold that provision in rule 55A of the Rules for furnishing copy of enquiry report is procedural one and of a mandatory character, but even then a delinquent has to show that he

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has been prejudiced by its non-observance and consequently the law laid down by the Constitution Bench in the case of ECIL (1994 (2) LLN 9) (vide supra) to the effect that an order passed in a disciplinary proceeding cannot ipso facto be quashed merely because a copy of the enquiry report has not been furnished to the delinquent officer, but he is obliged to show that by non-furnishing of such a report he has been prejudiced, would apply even to cases where there is requirement of furnishing copy of enquiry report under the statutory provisions and/or service rules.

23. Turning now to the facts of the case on hand, it has to be seen whether by non-furnishing of the enquiry report the delinquent officer has suffered any prejudice. Undisputedly, after submission of enquiry report the State Government sent a show cause notice to the delinquent pursuant to which he had shown cause and the disciplinary authority after considering the said show cause, passed the order of dismissal. It is not stand of the respondent that in absence of the enquiry report he could not submit an effective show cause before the order of dismissal was passed. Neither from the order passed by the Tribunal nor the High Court it would appear that the respondent had raised this point there that he could not file an effective show cause in the absence of enquiry report or it has been stated that in the show cause reply it was complained that the delinquent had not been served with a copy of the enquiry report. From these facts, it is not possible to hold that the respondent has been prejudiced by non-furnishing of enquiry report. "

26. Therefore it is clear that supply of the enquiry report or the statements of witnesses is not based on any hard and fast rule and the rule of natural justice is not a straightjacket formula and the same has to be decided on the facts and circumstances of the case. On the factual matrix of this case, as I have enumerated above, I do not think that there is any violation of the principles of natural justice or prejudice caused to the petitioner, especially when the petitioner has not even chosen to question the same before the first respondent, appellate authority under the provisions of the Tamil Nadu Shops and Establishments Act. Having come in person and received his salary on 7.2.1992, it is unfair on the part of the petitioner to contend that he was not doing well to appear for the enquiry on 13.2.1992. As it is held by the Calcutta High Court in Garfa Co-operative Stores Ltd. v. Ld.Second I.T. (2000(1) LLN 226), once an opportunity was given to a delinquent and if the delinquent had appeared one day and then disappeared, the enquiry officer of the employer cannot be expected to get hold of the delinquent and it

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is for the person who is on the receiving end, namely, the employee to avail the same and if he fails to avail the same, the enquiry officer is well within his right to proceed with the proceedings in his absence. The relevant portion of the judgement is as follows:

> " 3. Having considered the materials placed before me and considered the submissions made by Sri Ganguly, I am of the view, the enquiry officer after giving all opportunities to the delinquent employee has come a fact finding. The reasoning of the learned Tribunal for upsetting the report of the enquiry officer is that without giving proper opportunity of being heard the order of dismissal was passed and so the enquiry officer held guilty. After perusal of the report of the enquiry officer I have found it is not the case without giving any opportunity. The matter has been disputed of. It appears that the delinquent officer on the second day appeared before the enquiry officer, thereafter without permission of the enquiry officer left the enquiry proceeding intending not to contest the disciplinary proceeding. It is not the duty of the employer or for that matter the enquiry officer to get hold of the delinquent. It is good enough to serve a notice upon the delinquent. It appears in response to the notice the delinquent did appear. Therefore it was not the duty of the enquiry officer to wait for another day for further appearance and arrival of the delinquent at his whims and caprice. I am of the view that the enquiry officer has rightly concluded the hearing and reasonable opportunity was given to the delinquent employee. I am of the further view that the principle of affording reasonable opportunity is not the one way traffic. It is for the person who is on the receiving end is to avail of such opportunity. If he does not avail of this opportunity upon his own misconduct then in that case the enquiry officer would be well within his right to proceed in his absence. "

27. Now, coming to the scope of judicial review of this Court under Article 226 of the Constitution of India in respect of disciplinary proceedings, as correctly contended by the learned counsel for the third respondent, the disciplinary authority is the sole authority to decide the matter on facts and this Court, while exercising jurisdiction under Article 226 of the Constitution of India cannot be expected to reappreciate the evidence and sit in appeal over the decision of the disciplinary authority. From the decision it is the preponderance of evidence that is sufficient to arrive at a conclusion and the technical rules of Evidence Act or strict proof of fact are not applicable to the disciplinary proceedings. The Supreme Court has laid down the law in this regard

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in B.C.Chaturvedi v. Union of India (1997 (4) LLN 65) in the following words:

> " 12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the Court. When an enquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rule of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to reappreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.
>
> 13. The disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate authority has co-extensive power to reappreciate the evidence or the nature of punishment. In a disciplinary enquiry the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal. In Union of India v. H.C. Goel (1964 (4) SCR 718), this Court held at page 728 that if the conclusion, upon consideration of the evidence, reached by the disciplinary authority, is perverse or suffers from patent error on the face of the

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record or based on no evidence at all, a writ of certiorari could be issued. "

28. It is relevant to point out that in this case the first respondent being the appellate authority has even allowed the petitioner to give evidence and many other witnesses were also examined and cross examined and even in the appellate stage the documents numbering 1 to 36 have been marked as Exs.A.1 to A.36 and the petitioner was allowed to give evidence as PW.1 apart from the evidence of the Enquiry Officer as RW.1 and marking documents as Exs.R.1 to R.8. The appellate authority, viz., the first respondent has exhaustively and in detail discussed the entire issue in thread-bare by appreciating the evidence as well as documents let in before it and has come to the conclusion that in fact the respondents have followed the principles of natural justice from the date when charge sheet was framed till final order passed and there was no violation of principles of natural justice. In such circumstances, it is not for this Court to again re-appreciate the evidence to give a different finding. In view of the same, the writ petition fails and the same is dismissed. No costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

Kh

To

1.Deputy Commissioner of Labour
(Appeal) Labour Welfare Building
Anna Salai, Chennai 6.

2.Deputy Registrar of Co.operative
Society, Kanchipuram.

1 cc to Mr.T. Kishore Kumar, Advocate, sR. 56325

WP.NO.9859 OF 2000

MDR (CO)
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